16819 v

December 12. 1774.

[Lord Coalston Reporter.]

INFORMATION

FOR

DAVID MAXWELL of Cardineſs, Eſq; Purſuer;

AGAINST

JOHN Earl of Galloway, and JAMES GORDON of Balmeg, Defenders.

IN the year 1769, the pariſh of Anwith in the ſtewartry of Kirkcudbright having become vacant, Mr Maxwell of Cardineſs, the patron, intended preſenting Mr Thomſon, a friend of his own, then miniſter of the Preſbyterian-meeting at Workington in Cumberland.

But the late Earl of Galloway having informed Mr Maxwell, that he was moſt anxious to provide for one Mr Gordon, the ſon of a freeholder, and expected friend of his Lordſhip's in the county of Wigton, he would conſider it as a moſt ſingular favour if Mr Maxwell would give this young man the preſentation to the pariſh of Anwith; and at ſame time, as he was ſenſible that the ſtipend of Anwith was more beneficial than that of Workington, he would chearfully grant an obligation to pay Mr Thomſon an equivalent to the difference of the profits of theſe two cures, aye and untill he Mr Thomſon ſhould be otherwiſe provided.

Mr Maxwell, tho' averſe to this complicated tranſaction, yet willing to oblige his friend Lord Galloway, agreed to give the preſentation to his friend Mr Gordon upon the above terms, whereupon the Earl granted the following letter, addreſs'd to the purſuer: "*Galloway-houſe, 1ſt September*, 1769. Sir, As I am moſt "anxious to have Mr William Gordon of Balmeg ſettled in the "pariſh and kirk of Anwith, of which you are patron; at the "ſame time, I am perfectly ſenſible of your inclinations to ſerve "Mr Gordon, and oblige me; yet as you wiſh to do a friend-"ſhip for Mr William Thomſon miniſter of the Preſbyterian "meeting at Workington in Cumberland, I promiſe, that upon "your ſettling Mr Gordon in the pariſh and kirk of Anwith, to "pay to Mr Thomſon the ſum of L. 20 Sterling yearly during all "the days of his life, or untill he is provided in a pariſh and kirk "in Scotland; and if he refuſe to accept of a preſentation, to "have the ſame effect as if he had been ſettled; and this annuity "to continue during Mr William Gordon's life, and his being "continued in the poſſeſſion of the pariſh and kirk of Anwith; "but in the event of either Mr Thomſon not accepting a preſen-"tation, or death, or being otherwiſe provided, or of Mr Gor-"don's removal from Anwith, or his death, this obligation to be "void and null. The firſt half year's payment of Mr Thomſon's "annuity, *viz.* L. 10, to be payable when Mr Gordon is intitled "and has right to half a year's ſtipend, and ſo yearly and termly "thereafter. And I further promiſe to grant an obligation on "ſtamped paper on the above terms when required. I am, Sir, "your humble ſervant. (Signed,) GALLOWAY.

From this letter it would appear, that the Earl had been abundantly attentive to relieve himſelf from the effects of this obligation, ſo ſoon as either he or the purſuer ſhould have it in their power to provide Mr Thomſon; yet it now appears, from a production in proceſs made by the Earl of Galloway, that he had taken a ſtill more effectual ſecurity, by obtaining a letter of relief of ſame date from Mr Gordon of Balmeg, the father of the preſentee, of which the tenor follows: "*Galloway-houſe, September* "*1ſt* 1769. My Lord, As your Lordſhip has granted an obliga-"tion to Mr Maxwell of Cairdneſs to pay to the Reverend Mr "William Thomſon Preſbyterian Miniſter in Workington, Cum-"berland, the ſum of L. 20 Sterling yearly, upon Mr Maxwell's

"ſettling

" ſettling my ſon William miniſter at Anwith, and that ſaid L. 20
" is to be paid yearly and termly, beginning the firſt term's pay-
" ment when the firſt half year's ſtipend becomes due to my ſon,
" and ſo yearly and termly until Mr Thomſon is preſented to a
" kirk in Scotland, or otherwiſe provided in England, or until
" the event of Mr Thomſon's death, or the event of my ſon's
" death, or his leaving the pariſh of Anwith: And as your Lord-
" ſhip has been ſo kind and friendly to me, to grant ſuch obligation
" entirely to ſerve me, I hereby oblige myſelf to free and relieve
" your Lordſhip of ſaid obligation, by paying you L. 20 Sterling,
" yearly and termly as above narrated. And I do hereby oblige
" myſelf to grant your Lordſhip an obligation on ſtamped paper in
" terms of the above, whenever your Lordſhip thinks proper to
" demand it. And I ever am, my Lord, your much obliged and
" moſt obedient humble ſervant. (Signed,) JAMES GORDON."

The tranſaction between the Earl and Mr Maxwell being compleated by his Lordſhip's letter above recited, Mr Gordon was in conſequence thereof ſettled in the pariſh of Anwith *prior* to Whitſunday 1770, and thereby acquired right to the whole of that year's ſtipend. And Mr Thomſon having granted a letter of attorney to Mr Maxwell, of date 15th Auguſt 1770, impowering him to uplift the foreſaid annuity, he in virtue thereof received from the Earl, by the hands of James Gordon of Balmeg, one year's annuity, falling due at Whitſunday and Michaelmaſs 1770, for which he granted his receipt in the terms above-mentioned.

The reaſon of Balmeg's appearing in the character of paymaſter of this annuity proceeded from this circumſtance, that ſometime after the concluſion of the tranſaction, the Earl of Galloway aſked as a favour of Mr Maxwell that he would accept of the annual payment for Mr Thomſon by the hands of Balmeg, who would grant him a collateral ſecurity to that effect. Mr Maxwell willing ſtill further to accommodate his Lordſhip, agreed to this other propoſal; but conditionally, that he ſhould have recourſe upon his Lordſhip, ſo ſoon as Mr Gordon ceaſed to be punctual in his payments; whereupon a letter of the following tenor was granted by Mr Gordon of Balmeg: " Sir, As Lord Galloway granted an obli-
" gatory miſſive letter to you, bearing date at Galloway-houſe,
" Sept. 1, 1769, wherein his Lordſhip obliged himſelf to pay you,
" for behoof of the Rev. Mr William Thomſon miniſter of the
" Preſbyterian meeting-houſe in Workington, in Cumberland,
L. 20.

" L. 20 Sterling during his life, or until his Lordſhip procured " him a preſentation to any pariſh-church within Scotland; pro- " viding always, that you preſented and ſettled my ſon Mr Wil- " liam Gordon as miniſter of Anwith, as the ſaid miſſive letter " more fully bears; and ſeeing you have fulfilled your part of the " obligation, by ſettling my ſon miniſter of Anwith, it is but " juſt and reaſonable Mr Thomſon ſhould have his annuity regu- " larly paid him: And as I am ſatisfied that annuity ſhould be " regularly paid, without giving my good friend Lord Galloway " any trouble, I hereby empower you, in name of my ſon, to pay " Mr Thomſon his annuity of L. 20 Sterling yearly, out of the " teinds payable upon your eſtate in Anwith; and I hereby o- " blige myſelf, upon your producing Mr Thomſon's receipt for " ſaid ſum of L. 20 Sterling yearly, to procure you my ſon's diſ- " charge for the teinds payable out of your eſtate, equal or effier- " ing to the foreſaid ſum of L. 20 Sterling yearly, I am, *&c.*"

Though Balmeg, as juſt now mentioned, had already paid the firſt year's annuity, yet he thought proper to refuſe payment of the ſecond: Whereupon Mr Maxwell, unwilling to enter into any diſpute with him, returned him his letter above recited, and had recourſe to the Earl of Galloway, his original obligant, with whom alone he had contracted, and to whom alone he ultimatly truſted for payment, and from him he received the following letter:

Newton-Stewart, Aug. 21. 1772.

" Dear Sir, I expected to have had the pleaſure of meeting you " here at the races, and to have talked to you fully in regard to " Balmeg's refuſing to pay the annuity that he and I bound our- " ſelves to pay to you for Mr Thomſon's behoof. I have had a- " nother communing with Balmeg, and he tells me plainly, that " he'll never pay one farthing of it till he is compelled by a de- " creet. As that's the caſe, ſurely it is more juſt and reaſonable " that you inſiſt againſt him than againſt me, eſpecially as he be- " gun the payment with you; and you received one year's an- " nuity from him, and gave him a diſcharge for it. I am perfect- " ly pleaſed that you give us both a ſummons upon our obligatory " letters. I ſhall make no defence, only ſo far as to fix the pay- " ment upon Balmeg and relieve myſelf, which, I think, will be " eaſily done, and be moſt obliging to me; and you'll pardon me " for refuſing to pay upon any other terms. I remain, Dear Sir, *&c.*"

Mr Maxwell being thus treated by thoſe he intended to oblige, he, without heſitation, brought the preſent action, founding upon the

the *ſpecies facti* above narrated, and particularly upon the Earl of Galloway's holograph obligatory miſſive, of date Sept. 1. 1769, above recited. This action does not conclude againſt both the Earl and Mr Gordon of Balmeg, as recommended in his Lordſhip's letter above recited, but againſt the Earl alone, he being the perſon the purſuer at firſt intended to oblige, with whom alone he had communed and contracted, from whom he primarily and ultimatly truſted for payment, and who alone he wiſhed to conſider as his proper party in any judicial procedure that might enſue; for although, in order to accommodate his Lordſhip, he might have been willing to receive a voluntary fulfilment of that obligation from Mr Gordon of Balmeg; yet ſo ſoon as that ceaſed to be voluntary, he conſidered it as the buſineſs of the Earl alone to ſettle that diſpute with Balmeg, in which the purſuer could not be involved.

This action having come in courſe before the Lord Coalſton Ordinary, his Lordſhip, after hearing counſel for the purſuer, the Earl of Galloway, and Gordon of Balmeg, and after adviſing full minutes of debate, was pleaſed to pronounce the following judgment: "The "Lord Ordinary having conſidered the foregoing minute of debate, "finds, That James Gordon of Balmeg is intitled to be heard for "his intereſt in this cauſe, and admits him accordingly: But in "reſpect of the circumſtances of this caſe, and more eſpecially "that it is not alledged, that Mr William Gordon the preſentee "was privy to the tranſaction between the Earl of Galloway, Mr "Gordon of Balmeg, and the purſuer, and that the contrary is "now averred by the ſaid Mr Gordon, repels the defences, and "decerns for payment of the annuities libelled, bygone and in "time coming, in terms of the letter ſigned by the defenders, "and obligation of relief relative thereto: Finds James Gordon, "who has appeared for his Intereſt in this proceſs, liable in ex-"pences, and allows the purſuer to give in an accompt there-"of." Mar. 1. 1774.

And upon adviſing repreſentation for Balmeg, with anſwers for the purſuer, his Lordſhip was pleaſed to pronounce this other judgment: "The Lord Ordinary having conſidered this repre-"ſentation, with the anſwers thereto, finds, That the late Earl "of Galloway was the party called as defender in this proceſs, July 6. 1774.

" which has been ſince transferred *in ſtatu quo* againſt the preſent " Earl, his ſon and heir: Finds, That no compearance has been " hitherto made in this proceſs for either of theſe two Lords, and " therefore decerns in abſence againſt the preſent Earl of Gallo- " way for payment of the annuities libelled, bygone and in time " coming; but reſerves any claim of relief his Lordſhip may have " in the letter ſaid to have been granted by Gordon of Balmeg: " and reſerves to him any defences he may have againſt ſuch " claim."

The Earl of Galloway, who had made no appearance ſince the firſt calling of this proceſs, finding himſelf now primarily liable in terms of this decerniture, gave in a repreſentation, praying an alteration thereof; and at ſame time repeated a ſummons of relief againſt Balmeg, founded upon his obligatory letter to the late Earl of Galloway, of date 1ſt September 1769, as above re-
July 27. 1774. cited; whereupon the Lord Ordinary was, of this date, pleaſed to allow the Earl of Galloway to repeat his ſummons, and to conjoin the ſame with this proceſs. And at an after-calling, was
Aug. 2. 1774. further pleaſed to make *aviſandum* to your Lordſhips, and to ordain parties to give in informations upon the whole cauſe: In obedience to which, what follows is humbly offered upon the part of the purſuer.

" After ſo full a detail of the various facts giving riſe to this " queſtion, together with the previous ſteps of procedure, the pur- " ſuer is hopeful few words will be requiſite upon his part, to ſatis- " fy your Lordſhips, that he falls to have decreet againſt one or " other of theſe defenders for the annuities bygone and in time co- " ming, in terms of the Earl of Galloway's letter, September 1. " 1769; and this the more eſpecially, as it is evident the preſent " tranſaction does not fall under any of the ideas known in our " law deſcriptive of the crime of Simony, which it would appear is " the only defence Mr Gordon has been adviſed to plead in bar of " the preſent action.

Through the whole of the writings before the Lord Ordinary, Mr Gordon has been pleaſed *de plano* to take it for granted, that the preſent tranſaction falls to be conſidered as a ſimoniacal pac- tion; and having this once eſtabliſhed, he proceeds to ſhow what " are the penalties inflicted by the different ſtatutes upon the per- " petrators of this crime: But the purſuer will be forgiven in not

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granting this moſt material *petitio principii*; for he is confident he ſhall be able to ſatisfy your Lordſhips, that the tranſaction now in queſtion does not fall under any one idea of Simony known or acknowledged by the law of this country; neither could the moſt rigid church-diſciplinarian conſider this tranſaction as the moſt diſtant infringement upon the ſtricteſt principles of morality, much leſs the proper ſubject of reduction in a court of law.

The word *Simony* is undoubtedly derived from Simon Magus, and the idea meant to be conveyed by this word comprehends the crime for which he was puniſhed, which was ſimilar to that of purchaſing holy orders; and, upon inveſtigation, it will be found, that the word *Simony* is never made uſe of in any of our ſtatutes or law-books, but where this idea alone is meant to be conveyed.

Mr Gordon did but faintly diſpute this definition of the crime of Simony, as eſtabliſhed by the law of Scotland, but he had recourſe to the laws of England, where this crime has acquired a more extenſive interpretation; but as this queſtion falls to be determined by the laws of our own, not that of our neighbouring country, it will be unneceſſary to trouble your Lordſhips with a refutation of the different caſes quoted from the practice of that kingdom; but ſuffice it to ſay, that the only definition given of this crime, by our ſtatutes and law books, is altogether conſentanious with that juſt now mentioned: For inſtance, the ſtatute 1612. c. 1. has conſidered that crime to be Simony alone, where the preſentee has agreed with the patron to give up part of his benefice to the prejudice of his ſucceſſors; and even ſuch agreement is not reckoned Simony, either by that act or the act 1661, c. 9. if the preſentee, after granting tack to the patron of the fruits of his benefice, has reſerved a ſufficiency to himſelf; and as in the preſent caſe it is acknowledged, that the preſentee was not privy to the tranſaction, neither has the patron procured a tack of the fruits of his benefice; ſo it of conſequence follows, that the ſtipend of the incumbent not being encroached upon, and the patron receiving no benefit from his preſentation, that the preſent caſe does not fall under the intendment of either of the ſtatutes above quoted.

The definition given by Lord Bankton of this crime, is preciſely ſimilar, for he makes the eſſence of the fault to conſiſt in the preſentee having acquired his preferment through the means of

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valuable conſiderations beſtowed on the patron; for this alone he
Book II. title 8. par. 63. defines to be a ſimoniacal paction, "If the preſentee ſhall give a "promiſe or valuable conſideration for being preſented." And that ſuch likewiſe is Sir George M'Kenzie's idea of this crime, appears evidently from peruſal of his title *Simony*, where, after mentioning the act 1612, as the only one relative to this crime, he thus expreſſes himſelf: "I conceive that whatever is puniſhed as "Simony by the Canon law, is puniſhable with us; and there- "fore, that *a miniſter, or other beneficed perſon*, who bargains or tranſ- "acts with any to get them a church or benefice, *and gives or pro- "miſes money therefore*, is puniſhable even by our law." From all which it is manifeſt beyond a doubt, that the crime of Simony is conſidered by our law to conſiſt ſolely in that of the preſentee's having given a valuable conſideration for his preferment.

That tranſactions, ſuch as theſe juſt now ſtated, were alone conſidered as falling under the intendment of the legiſlature, muſt appear obvious from the ſlighteſt conſiderations of the motives that produced this enactment. The ſtate is intereſted, that the church ſhould be provided with proper miniſters; the beſt method of attaining which end, is, that the choice of the patron ſhould be free and unbiaſſed, ſo that it may fall upon the moſt worthy candidate, who ought to depend upon merit alone for attaining the wiſhed-for preferment. Hence, in purſuance of this plan, the law has inflicted both pains and penalties upon that candidate who ſhall attain his preferment through other inducements than that of his own merit: As alſo, upon that patron who ſhall beſtow ſuch preferment for valuable conſiderations given and received. From whence it of conſequence follows, that if it ſhall appear that the patron neither received, nor the candidate beſtowed valuable conſiderations for his preferment, the law has not authoriſed further enquiry to be made concerning the reaſons that induced the patron to beſtow ſuch preferment.

Mr Gordon did alſo reſort to the ſtatute 1612, in order to ſhew that the crime of Simony was puniſhable by the common as well as eccleſiaſtical law. The purſuer has no occaſion to diſpute this fact: For the queſtion ſtill returns from whence it came, *viz.* what is meant by the crime of Simony in the law of Scotland. But it has already been ſhown, that this ſtatute, and all the law-books of our country, define the eſſence of Simony to conſiſt in that of the preſentee giving, or the patron receiving a valuable conſideration

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for his preſentation; neither of which being pretended to have happened in the preſent caſe, it becomes unneceſſary to purſue difficulties where none occur.

Mr Gordon made one other attempt, in which, had he ſucceeded, the purſuer muſt acknowledge there would have been more relevancy than in his whole other defences. It was, That by the preſent tranſaction, the ſtipend of the incumbent was greatly diminiſhed, and of conſequence that this caſe fell directly under the exceptions of the ſtatute 1661, c. 9. But Mr Gordon, when making this ſuppoſition, had certainly forgot, that it is directly contradictory to his own repeated judicial acknowledgments, upon which the Lord Ordinary's firſt interlocutor 1ſt March 1774 is expreſsly founded, where it is averred by Mr Gordon himſelf, that the preſentee was in no degree privy to the preſent tranſaction, from whence it neceſſarily follows, that his ſtipend could not be impaired by an agreement betwixt third parties, with which he had no concern.

With a view to gain additional weight to the preſent defence, Mr Gordon did alſo attempt to ſhow, that the law of England has conſidered the crime of Simony in a more extenſive view than the one now given by the purſuer, and therefore had recourſe to ſeveral partial quotations from the works of Mr Burn and Judge Blackſtone. But were it to be admitted, that theſe inſtances were more applicable to the caſe in hand than they really are, yet they could have no influence upon the deciſion of the preſent diſpute, as it is by the laws and practice of Scotland, not thoſe of England, that this queſtion falls to be determined.

But at ſame time the purſuer is ſatisfied, that from a fair peruſal of theſe authors, and of Judge Blackſtone in particular, it will appear, that his idea of the crime of Simony is pretty much the ſame as the one juſt now contended for by the purſuer. His definition of that crime is, "That Simony is the corrupt preſentation "of any one to an eccleſiaſtical benefice for money gift or re- "ward." And a little below he adds, "That by the Canon Law, "it was a very grievous crime, and is ſo much the more odious, "becauſe, as Sir Edward Coke obſerved, it is ever accompanied "with perjury; *for the preſentee is ſworn to have committed no Simony.*" And again, when giving examples of the different tranſactions that do or do not fall under the definition of the crime, he gives the following inſtance: "It is held, that for a father to purchaſe ſuch

Blackſtone B. II. chap. 18. 4.

Ibid.

"a preſentation, in order to provide for his ſon, *is not Simony; for* "*the ſon is not concerned in the bargain*, and the father is in nature "bound to make a proviſion for him." This laſt inſtance is ſo directly in point, and ſo concluſive of the preſent queſtion, that it would be improper in the purſuer to trouble the Court with any concluſions of his own what would be the deciſion of the Courts of England upon a queſtion ſimilar to the preſent; but he may venture to ſay, that from theſe quotations it is perfectly evident, that Judge Blackſtone's opinion of the crime of Simony is altogether agreeable to that of our own lawyers, *viz.* that it conſiſted in the preſentee's giving, and the patron's receiving a valuable conſideration for his preſentation. Hence the uniform practice of ſwearing the preſentee that he had committed no Simony.

Mr Gordon was further pleaſed to quote an Engliſh deciſion, collected by Mr Burn, in his treatiſe upon Eccleſiaſtical Law. But that caſe, by proving too much, proves nothing: For there a trifle, given to a footman, without the knowledge of either patron or preſentee, was found to void the preſentation. Were ſuch doctrine to be eſtabliſhed in our practice, it would put it in the power of any third party to void the preſentation of the moſt worthy candidate, conferr'd by the moſt conſcientious patron, by giving a few ſhillings to any of the patron's menial ſervants, as an inducement to them to uſe their intereſt with their maſter, to give his aſſiſtance to a particular candidate. Such a caſe can ſcarcely merit a ſerious diſcuſſion.

Mr Gordon not truſting altogether to the deciſions of the Engliſh Courts, fell upon a deciſion of your Lordſhips, Steven againſt Yule, 20th February 1759; but this does in no degree apply to the preſent queſtion: For in that caſe, the heretors had procured an obligation from the friends of the preſentee, to obtain a gift, or pay a year's vacant ſtipend, to be applied for the reparation of the church, manſe, &c. burdens to which the heretors themſelves were by law ſubjected; and action was accordingly refuſed on this obligation, upon the very principles laid down by the purſuer. For there, the heretors were conſidered as patron; and being legally obliged to repair the church, manſe, &c. an obligation granted them for relief of that burden, was conſidered as the ſame thing as giving them a valuable conſideration for their votes. Hence the law conſidering their judgments as biaſſed in the election of a proper candidate, moſt juſtly refuſed action upon

ſtich obligation. But in the preſent caſe, as it is not inſinuated that the patron received any valuable conſideration to pervert his choice, ſo likewiſe is it acknowledged, that the preſentee was in no degree privy to the tranſaction. Hence it is evident, that the very eſſence of the crime of Simony, and the foundation of the above quoted deciſion, is no where to be found in the preſent tranſaction.

It has been already ſhown, that the caſe in hand does not fall under any of the ideas of the crime of Simony known in our law, ſo is it equally clear, that this tranſaction cannot be conſidered as a treſpaſs cognizable at common law; for it will not be diſputed that Mr Gordon was both naturally and civilly bound to aliment his own ſon till he was in a capacity to do for himſelf; of conſequence it was neither an illegal nor an improper act in the father, with a view to obtain a perpetual proviſion to his ſon, to grant a temporary obligation for what that ſon at a moderate computation annually coſt him. Neither was it illegal or irrational in the purſuer to be anxious to provide his friend when it was in his power; or if by any means he was prevailed upon to beſtow that proviſion for ſome ſhort time upon another, that in ſuch event he was well intitled to ſtipulate ſome temporary ſupport to that friend; and that ſuch ſtipulations muſt be conſidered as highly obligatory in every court of honour, and juſtly actionable in every court of law, is a propoſition too clear to be controverted.

Upon the whole therefore, as it is evident, that neither party concerned in this tranſaction have exceeded the bounds preſcribed by either the ſtatute or common law, (except that of the defenders refuſing implement of their obligations) the purſuer can entertain no doubt that your Lordſhips will pronounce decreet againſt one or other of theſe defenders, or againſt both conjunctly and ſeverally; and will further find the purſuer intitled to his full expences.

In reſpect whereof, &c.

WA. CAMPBELL.